

May 5, 2014

Ana McKee, Conflict of Interest Coordinator  
Department of Motor Vehicles  
Human Resources Branch  
2415 1<sup>st</sup> Avenue, Mail Station A 208  
Sacramento, CA 95818

Re: Your Request for Advice  
**Our File No. A-14-050**

Dear Ms. McKee:

This letter responds to your request for advice, on behalf of the Department of Motor Vehicles (the “DMV”), regarding the conflict-of-interest code provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

Must the Team Manager and staff members hired to provide independent verification and validation services file statements of economic interest as consultants under the DMV’s conflict-of-interest code?

### CONCLUSION

The Team Manager and staff members are consultants and must file statements of economic interests as required by the Act.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

The DMV's information technology system is large and complex, as the DMV maintains the largest database of its kind in the United States, consisting of approximately 110 million vehicle registration records and 40 million driver licenses and identification records. Moreover, the DMV computer systems for licensing and registration process over two million transactions per day. In light of the department's information technology needs, the DMV is currently undertaking an Information Technology Modernization Project (the "ITM Project") to reduce the risks associated with current technologies, allow the DMV to meet legislative mandates, and take advantage of current technological capabilities and resources. Under this project, the DMV will deploy multiple ITM solutions over a planned six-year schedule.

As part of this project, the DMV has hired a contractor to provide independent verification and validation ("IV&V") services. The contract has a term of 23 months and provides an option for a one-year extension.

As required in the contract, the contractor must provide a minimum of four individuals to perform the IV&V services including a Team Manager and three staff members. Pursuant to the contract, the Team Manager:

- Provides the day-to-day performance of IV&V activities for the ITM Project.
- Must monitor, review, analyze, assess, evaluate, and report on the specification, development, and implementation of the proposed ITM Project solution in accordance with the DMV's project requirements for projects deemed as high criticality.
- Will employ information technology system engineering and management discipline principles/best practices and produce documentation and artifacts necessary to carry out verification and validation activities, including reporting to the DMV.
- Ensures the solution is implemented in compliance with ITM Project solution specifications based on ITM Project requirements and that this compliance will result in the solution accomplishing its intended purpose.

Staff members are responsible for assisting the Team Manager in the day-to-day performance of IV&V activities and will conduct IV&V activities under the direction of the Team Manager. The staff members may work with the DMV management and staff and ITM Project Vendors, selected by the DMV, to verify and validate significant project components, including: resource coordination, systems documentation, information technology infrastructure upgrade, applications development, data architecture development, web development, testing, and integration. Minimum requirements for staff members include multiple years experience in the analysis and design of information technology systems.

## ANALYSIS

The Act requires that certain assets and income of public officials that may be materially affected by their official actions be disclosed. In appropriate circumstances, the officials should be disqualified from acting in order to avoid a conflict of interest. (Section 81002(c).) To accomplish this purpose, the Act requires public officials who make or participate in the making of governmental decisions to file statements disclosing their economic interests. (Sections 87300 *et seq.*; Regulations 18701 and 18702.2.)

Under Sections 87300, every public agency must adopt a conflict-of-interest code enumerating the positions within the agency that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest. The disclosure obligations of these filers are set by the conflict-of-interest code adopted by their respective agencies. Persons so designated in the conflict-of-interest code are known as “designated employees,” a term that includes officers and employees of an agency, as well as an agency’s *consultants*. (Section 82019.)

To determine whether the Team Manager or staff members hired to provide IV&V services must file statements of economic interest as designated employees, we must determine whether they are consultants under the Act. However, we must caution that the term “consultant” is given a very specific meaning under the Act, which may vary from the definition typically used for the term in commercial parlance. Under Regulation 18701(a)(2), a “consultant” is defined as an individual who, pursuant to a contract with a public agency:

“(A) Makes a government decision whether to:

“(i) Approve a rate, rule, or regulation;

“(ii) Adopt or enforce a law;

“(iii) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

“(iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

“(v) Grant agency approval to a contract that requires agency approval and to which the agency is a part, or to the specifications for such a contract;

“(vi) Grant agency approval to a plan, design, report, study, or similar item;

“(vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

“(B) Serves in a staff capacity with the agency and in that capacity participates in making a government decision as defined in [R]egulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code [S]ection 87302.”

### **Team Manager**

Under the contract, the Team Manager is tasked with the final responsibility to independently verify and validate proposed ITM Project solutions. Thus, it appears that the Team Manager makes governmental decisions to grant approval to a plan, design, report, study, or similar item and is a “consultant” as defined in Regulation 18701(a)(2)(A). As a consultant, the Team Manager must file statements of economic interest as required under the Act.<sup>2</sup>

### **Staff Members**

Regulation 18701(a)(2)(B) provides two tests to determine if an individual is a consultant. The first test is whether the individual (a) serves in a staff capacity with the agency and (b), in that capacity, participates in making a governmental decision as defined in Regulation 18702.2. The second test is whether the individual (a) serves in a staff capacity with the agency and (b), in that capacity, performs the same or substantially the same duties of an individual holding a position specified in the agency’s conflict-of-interest code. (*Wasko* Advice Letter, No. A-04-270.)

The phrase “serves in a staff capacity” in subdivision (B) has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have advised that a contractor serves in a staff capacity where the contract calls for work to be performed “over more than one year” on “high level” projects. (*Ferber* Advice Letter, No. A-98-118.)

Alternatively, we have advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12 - 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239), and where, under a multi-year contract, the contractor would perform only on a sporadic basis (*Maze* Advice Letter, No. I-95-296 and *Parry* Advice Letter, No. I-95-064).

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<sup>2</sup> While we have concluded based upon the facts provided that the Team Manager is a “consultant” per Regulation 18701(a)(2)(A), we note that the Team Manager is also a “consultant” under the Regulation 18701(a)(2)(B) because the Team Manager serves in a staff capacity and participates in governmental decisions as further explained below.

Under the facts you have provided, the ITM Project is multifaceted and involves all aspects of the DMV's large and complex information technology systems. Moreover, the contract is for a term of 23 months with an option for an additional year extension and staff members will be tasked with using their information technology expertise to "verify and validate" ITM solutions. Accordingly, the staff members will be testing and approving ITM solutions for DMV's large and complex information technology systems, which would normally be tested and approved by high-level DMV staff members and DMV managers. (See *Ferber Advice Letter, supra.*) Considering both the length of the contract and the high-level of decisions to verify and validate ITM solutions on behalf of the DMV and DMV managers, we find that the staff members employed under the contract are serving in a staff capacity in performing IV&V services. Thus, the only remaining question in determining if the staff members are consultants is whether the staff members are participating in making governmental decisions. Regulation 18702.2 states that an official participates in making a governmental decision when, acting within the scope of the official's position, the official:

"(a) Negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision referenced in [Regulation 18701(a)(2)(A)];

"(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

"(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official for the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]; or

"(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official for the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]."

As stated in your request for advice, the staff members are responsible for assisting the team manager in the day-to-day performance of IV&V services. Most significantly for purposes of this analysis, the staff members will be assisting the team manager in making the manager's decisions to verify and validate proposed ITM solutions. In performing this role, it appears that the staff members are directly advising or making recommendations to the decisionmaker and are therefore participating in governmental decisions under Regulation 18702.2. Accordingly, the staff members are "consultants" as defined in Regulation 18701(a)(2)(B) and must file statements of economic interest as required under the Act.<sup>3</sup>

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<sup>3</sup> Under Regulation 18734, consultants and newly created positions shall file under the broadest disclosure category until the agency amends its code to reflect the position or the agency sets an interim disclosure category. You have stated that your department has determined that the contractors should file under Category 6 of DMV's existing code, which requires the reporting of:

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Counsel, Legal Division

BGL:jgl

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“All investments, business positions in business entities, and sources of income, including receipts of gifts, loans, and travel payments, from entities that provide services, supplies, materials, machinery, or equipment of the type purchased or leased by the designated position’s division.”

Based upon the duties described, it appears that Category 6 is appropriate to the positions in question. However, we note that the DMV must set interim disclosure in a written document including “a description of the position’s duties and, based upon that description, a statement of the extent of disclosure requirements.” (Regulation 18734(b).)

# LEGAL DIVISION ASSIGNMENT SHEET

Tracking Number:	14063
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ITEM DESCRIPTION			
Advice Letter No.	14-050	Requestor	McKee, Ana
Regulation Project No.			
Other (describe)			

Received By FPPC On:	03/12/14	Due Date:	04/11/14
Assigned To:	Jack Brian	Date To Assignee:	03/12/14 Reassigned 03/27/14
Date sent to AG/DA (if 1090)		Date AG/DA respond, if any	

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
Proofed				
Senior		WJL (v1)/Scott (v2)		
TAD Chief (SEI, Campaign, Conflict of Interest Code letters)				
Assistant GC		JWW		
General Counsel				
Executive Director (discretion of GC)				
Chair (discretion of GC)				